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No. 87-398

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California general partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, *et al.*,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The City ignores the dangerous precedent that would result if the ruling below is allowed to stand. States and local governments would be free to circumvent the Takings Clause by conditioning the right to occupy or

develop property upon payment of exorbitant "fees" that have no reasonable relationship to any public burden caused by the development.

This Court has jurisdiction. The California Supreme Court's first order (April 30, 1987) was not a "final decision" from which appellant could have appealed (see Mot., p. 5), as that order expressly stated "[p]etitions for review GRANTED" (Jur.St., Appx. C). The second order (June 3, 1987) did not merely "confirm" the first order (see Mot., p. 5); the second order completely changed the disposition of appellant's petition for review from "granted" to "denied" (Compare Jur.St., Appx. C with Jur.St., Appx. B). Even if it were arguable that the first order was appealable, the time to appeal began to run from the second order which, in response to a request by all parties,

"'resolve[d] a genuine ambiguity in a judgment previously rendered'" (Burlington Northern Inc. v. United States (1982) 459 U.S. 131, 138, n. 5; quoting F.T.C. v. Minneapolis-Honeywell Co. (1952) 344 U.S. 206, 211-212).

The City does not dispute that the due process and equal protection issues were raised by appellant and decided below.[1] As to the Takings Clause issue, the City avoids coming to grips with the procedural history of the case: (1) appellant's case was tried in a consolidated trial with the Pacific

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1 The City makes no attempt to respond to appellant's argument on these issues that the ordinance is an attempt to shift the burden of paying for public transportation from taxpayers and passengers to a handful of property owners (Jur.St., pp. 12, 13; but see Pennell v. City of San Jose (1986) 42 Cal.3d 365, 372-373, n. 9, jurisdiction postponed (1987) 107 S.Ct. 1346 (pending U.S. Sup.Ct. No. 86-753)).

Gateway/ Crocker cases, except as to state claims not relevant here (Jur.St., Appx. D, p. 3), and the trial court decided the Takings claim; (2) the court of appeal decided appellant's case with the Pacific Gateway/ Crocker cases in a single, consolidated decision (Jur.St., Appx. A, p. 1; Order of court of appeal granting motion to consolidate (May 19, 1986)), which similarly decided the Takings claim ; and (3) the California Supreme Court has similarly treated the cases as consolidated and has decided the Takings claim by limiting its review to the issue of retroactivity of the ordinance, raised by the City's petition for review (see Jur.St., Appx. B and C).[2] Thus, the Takings Clause issue was

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2 Because Pacific Gateway Associates Joint Venture, Crocker National Bank,

(Footnote Continued)

raised in the consolidated proceedings in the trial court, court of appeal and California Supreme Court, and was decided by the state courts (Jur.St, Appx. A, p. 9; Jur.St., Appx. D, p. 8). "Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised" (First English Evan. Luth. Ch. v. Los Angeles Cty. (1987) ___ U.S. ___, 107 S.Ct. 2378, 2385, n. 8).[3]

(Footnote Continued)

and Crocker Properties, Inc., were parties in all the consolidated proceedings below, they are appellees in this appeal pursuant to Rule 10.4 of the Rules of this Court.

3 This is not a case, as in the authority cited by the City, where appellant "did not ask the Supreme Court of California to review the judgment entered by the Court of Appeal in this case" (Banks v. California (1969) 395 U.S. 708, 708). Moreover, the City's argument that a party must

(Footnote Continued)

The Takings Clause issue is of crucial importance to property owners and to states and local governments throughout the country. There is no basis for the suggestion that the courts below applied a standard of review that satisfied the Takings Clause (Mot., pp. 18-19). The trial court found only that the transit fee ordinance had a "debatable rational basis" (Jur.St., Appx. D, pp. 13, 17, 18, 25), and the court of appeal affirmed those findings as supported by substantial evidence (Jur.St., Appx. A, p. 17). The City concedes that "someone will be prepared to controvert virtually any statement"

(Footnote Continued)

personally raise an issue in the state courts without relying on a co-party's raising of the issue (Mot., p. 9) relies entirely upon cases that pre-date the modern rule that it is enough that an issue has been considered and decided.

(Mot., p. 18, n. 24)--i.e., everything is "debatable" in the sense that term is used by the City and the courts below. Thus, the "debatable rational basis" test is illusory and allows fees to be set in any amount.

Nollan v. California Coastal Com'n (1987) ___ U.S. ___, 107 S.Ct. 3141 has rejected a "rational basis" test (and necessarily a "debatable rational basis" test) under the Takings Clause:

> "[O]ur verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved * * *, not that 'the State "could rationally have decided" the measure adopted might achieve the State's objective'" (107 S.Ct. 3147, n. 3; citation omitted).

The City's assertion that the "debatable rational basis" test used to sustain the fee was simply a different

way of expressing a "reasonableness" test for cost estimates (Mot., pp. 18-19) is disingenuous in light of the City's vigorous efforts to urge the trial court to reject a "reasonable cost" standard in favor of the City's "debatable rational basis" test. Accepting the City's argument, the trial court held that development fees were not subject to the reasonable cost limitations imposed by California law (California Government Code, § 50076), and therefore the California courts applied only the "debatable rational basis" test. As discussed in appellant's jurisdictional statement, California law expressly requires that development fees must not exceed the reasonable cost of providing the service for which the fee is charged (Jur.St., pp. 9-10). In asserting that the transit fee "is exactly tailored to serve the legitimate state purpose"

(Mot., p. 15; emphasis added), the City does not even attempt to respond to appellant's argument that a fee that exceeds the legislatively imposed limit cannot "substantially advance" a legitimate state interest (Jur.St., pp. 9-10).

This Court should resolve the important issue whether the Takings Clause limits the amount of fee exactions imposed by local governments and whether any meaningful standard of review should be applied in determining whether a fee exceeds an amount that substantially advances a legitimate state interest.

Respectfully submitted,

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